

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Order to Comply,
Labor Law Violation and Penalty
Assessment for Failure to Make and
Keep Records of Budget Towing, Inc.

**FINDINGS OF FACT, CONCLUSIONS
AND RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge M. Kevin Snell on January 29, 2008, at the Office of Administrative Hearings, 600 North Robert Street, Saint Paul, Minnesota. The record closed on January 29, 2008, at the end of the hearing.

Tricia L. Matzek, Assistant Attorney General, 445 Minnesota Street, Suite 900, Saint Paul, MN 55101-2127, appeared on behalf of the Department of Labor and Industry (Department). Patrick M. Connor, Esq., Dudley and Smith, P.A., Suite 2602, 101 East Fifth Street, St. Paul, MN 55101-1896, appeared on behalf of Budget Towing, Inc. (Budget Towing).

STATEMENT OF THE ISSUES

1. Did Budget Towing violate Minn. Stat. § 177.30 and Minn. R. 5200.0100 by failing to make and keep records for all hours worked each day and each workweek for all employees during the period of July 25, 2003, through July 25, 2005 (the “audit period”), for which Budget Towing is subject to enforcement under Minn. Stat. §§ 177.30 and 177.32, and if so, what is the appropriate penalty?

2. Did Budget Towing violate Minn. Stat. § 177.24, subd. 4, which limits deductions from employees’ wages for the cost of uniforms and equipment to their full cost or \$50.00, whichever is less, and, if so, what are the amounts of unreimbursed deductions for each employee during the audit period?

3. Did Budget Towing violate Minn. Stat. § 181.79 by improperly deducting amounts from employee wages for damage to property, and, if so, what are the improperly deducted amounts for each employee during the audit period?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Budget Towing has been doing business in Minnesota and employing individuals during the audit period of July 25, 2003, through July 25, 2005.¹

2. During the audit period, certain records of hours worked by Budget Towing employees do not contain a.m. and p.m. designations relating to the beginning and ending times of work by those employees.²

3. During the audit period, Budget Towing provided uniforms for certain employees to use, which were laundered weekly, and replaced them every two to three months. Budget Towing also provided telephones/pagers, which contained walkie-talkie features, to its employees. The employees were not allowed to use the telephone/pagers for personal use. During the audit period, Budget Towing has charged and deducted from each employee's wages the following sums:

\$10.00 per week for use of Nextel telephones provided by Budget Towing;
and

\$10.00 to \$12.00 per week for the purchase and laundering of uniforms.³

4. Budget Towing employees signed documents authorizing payroll deductions in the amounts listed in Finding 3 above for the "furnishing and laundering of uniforms on a weekly basis" and the "cost of rental" for telephones/pagers. The documents further stated: "The money deducted each week is not refundable at anytime."⁴

5. Budget Towing did not reimburse any employees upon their termination of employment for the amounts deducted for uniforms and telephones/pagers.⁵

6. The unreimbursed amounts deducted for the uniforms of the 29 Budget Towing employees during the audit period is \$14,492.00.⁶

¹ Budget Towing's Affidavit, Matzek Affidavit, Exhibit D.

² Budget Towing's Aff. Matzek Aff., Exhibit G.

³ Testimony of Robert Rasmussen, Drew Sykes and Andrew Kennedy, Matzek Aff., Ex. K.

⁴ *Id.*, Matzek Aff., Ex. N.

⁵ *Id.*, Exs. 3 and 4.

⁶ Exs. 3 and 4.

7. The unreimbursed amounts deducted for the telephones/pagers of the 29 Budget Towing employees during the audit period is \$11,550.00.⁷

8. Budget Towing had six of its employee drivers sign, at or soon after the commencement of their employment, documents entitled DAMAGE CLAIM AGREEMENT that state:

BUDGET TOWING INC OF ST. PAUL company policy states that all tow truck operators and drivers are responsible for the property entrusted to them. This property includes the tow truck they are driving, equipment used, or issued to them, customers vehicles that are being serviced, customer vehicles that are being towed and vehicles that are being moved in our impound lot.

Drivers will pay for any damages deemed negligent to truck, equipment or customer vehicles. Payment will be made by employee's credit card or deducted from employee's paycheck. Deduction will be an amount of payment from each paycheck to cover the full amount of repair, while insuring employee received at least minimum wage on each paycheck.⁸

9. Six employees were held responsible by Budget Towing for damage to its vehicles, loss of its equipment, and damage to customer vehicles during the audit period. None were found liable for those damages or loss of equipment in a court of law.⁹ The following amounts were deducted from the wages of, or paid by cash or credit card by, the Budget Towing employees listed below, for damages during the audit period:

Douglas Dasilva	\$ 109.50
Andrew Kennedy	1,100.13
Jeff Murker	662.23
Robert Rasmussen	1,581.90
Henry Stokvis	150.12
Drew Sykes	1,656.50 ¹⁰

⁷ Exs. 3 and 4.

⁸ Exs. 5, Budget Towing's Aff. Matzek Aff., Exhibit L.

⁹ Test. of R. Rasmussen, D. Sykes and A. Kennedy, Exs. 9 through 14.

¹⁰ *Id.*, Exs. 3 and 4.

10. None of the six employees listed in Finding 9 above signed an agreement with Budget Towing to pay for the actual amount of the damages listed at a time after the losses occurred.¹¹

11. After being fired on or about July 12, 2005, Mr. Robert Rasmussen went to the Department on July 25, 2005, and filed a written complaint seeking final pay and unreimbursed, unauthorized deductions,¹² which caused the Department to initiate an investigation.¹³

12. On July 25, 2005, the Department sent Budget Towing an “inform and educate” letter that indicated a number of statutory violations, requesting a response in writing within 15 days of the date of the letter.¹⁴

13. The Department received no response to its “inform and educate” letter and therefore commenced a formal audit by sending Budget Towing a letter dated August 25, 2005, informing it of the audit and requesting:

- a. All payroll records, showing the amount paid each pay period.
- b. The name, last known address, telephone number, occupation, rate of pay, and social security number of each past and present employee during the audit period.
- c. All time cards or time sheets.
- d. Check stubs or check registers and receipts for cash payments of wages, if any.
- e. Proof of age for all minors employed.
- f. All records of deductions made to employee paychecks.
- g. Establishment information (see enclosed form).¹⁵

14. The Department received from Budget Towing a stack of payroll registers, but no daily or weekly records. After review of the records, the Department sent Budget Towing a letter on October 28, 2005, assessing a single \$1,000.00 penalty for failing to make and keep records of:

- a. The name, address and occupation of each employee;

¹¹ *Id.*

¹² Test. of R. Rasmussen, Ex. A.

¹³ Test. of Marlene Burgess, Senior Lead Investigator in the labor standards unit of the Department.

¹⁴ Ex. C, test. of M. Burgess.

¹⁵ Ex. D, test. of M. Burgess.

- b. The rate of pay, and the amount paid each payday to each employee;
- c. The hours worked each day and each workweek by the employee.¹⁶

15. On October 31, 2005, the Department sent Budget Towing a NOTICE OF LABOR LAW VIOLATION letter for improper wage deductions, which gave Budget Towing 10 days to voluntarily come into compliance.¹⁷

16. Budget Towing requested and was granted an informal conference, to which it brought additional information that was considered by the Department.¹⁸

17. On March 28, 2006, the Department issued an ORDER TO COMPLY: LABOR LAW VIOLATION letter that cited alleged violations of Minn. Stat. §§ 177.24, 177.30, 181.79, and Minn. R. 5200.0100.¹⁹

18. Budget Towing contested the Department's Order and on November 20, 2006, the Commissioner of the Department issued a Notice and Order for Pre-Hearing Conference.²⁰

19. On March 12, 2007, the Department filed a Notice of Motion and Motion for Summary Disposition, to which Budget Towing responded.

20. After a hearing on the Motion for Summary Disposition, on July 9, 2007, the Administrative Law Judge issued a Prehearing Order on Motion for Summary Disposition, which granted partial summary disposition in favor of the Department, which Order is hereby incorporated by reference. Also on July 9, 2007, the Department filed an Amended Notice and Order for Hearing.

21. After requests to extend discovery and an additional pre-hearing conference, on December 13, 2007, the Administrative Law Judge issued a Second Prehearing Order and Order for Hearing to be held January 29, 2008.²¹

Based on these Findings of Fact, the Administrative Law Judge makes the following:

¹⁶ Ex. E, test. of M. Burgess.

¹⁷ Ex. E, test. of M. Burgess.

¹⁸ Ex. I, test. of M. Burgess.

¹⁹ Ex. 2, test. of M. Burgess.

²⁰ Test. of M. Burgess, Notice and Order for Pre-Hearing Conference.

²¹ Alleged violations of Minn. Stat. § 181.961 were withdrawn by the Department and dismissed by the Administrative Law Judge in that order.

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Labor and Industry are authorized to consider the charges against Budget Towing under Minn. Stat. §§ 14.50 and 177.27.

2. Respondent received due, proper and timely notice of the charges, and of the time and place of the hearing.

3. The Department has fulfilled all procedural requirements of law and rule so that this matter is properly before the Administrative Law Judge.

4. Minn. Stat. § 177.27 authorizes the Commissioner to take disciplinary action against a person who violates any law, rule or order related to the duties and responsibilities entrusted to the Commissioner.

5. Pursuant to Minn. R. 1400.7300, subp. 5, the burden is on the Department to prove by a preponderance of the evidence that Budget Towing has violated a law, rule, or order related to the Commissioner's duties and responsibilities.

6. Minn. Stat. § 177.30 provides in applicable part:

Every employer subject to sections 177.21 to 177.35 must make and keep a record of . . . (3) the hours worked each day and each workweek by the employee; The records must be kept for three years in or near the premises where an employee works.

7. Minn. R. 5200.0100, entitled EMPLOYER RECORDS, provides:

By definition, 'hours worked each day' includes beginning and ending time of work each day, which shall include a.m. and p.m. designations, and such designations shall be included in the employer's records.

8. The Department proved by a preponderance of the evidence that Budget towing violated Minn. Stat. § 177.30 and Minn. R. 5200.0100 by failing to make and keep records for all hours worked each day and each work-week for all employees during the audit period.

9. The applicable portions of Minn. Stat. § 177.24 provide:

Subd. 4. **Unreimbursed expenses deducted.** Deductions, direct or indirect, from wages or gratuities not authorized by this subdivision may only be taken as authorized by sections 177.28, subdivision 3, 181.06, and 181.79. Deductions, direct or indirect, for up to the full cost of the uniform or equipment as listed below, may not exceed \$50. No deductions, direct or indirect, may be made for

the items listed below which when subtracted from wages would reduce the wages below the minimum wage:

- (a) purchased or rented uniforms or specially designed clothing required by the employer, by the nature of the employment, or by statute as a condition of employment, which is not generally appropriate for use except in that employment;
- (b) purchased or rented equipment used in employment, except tools of a trade, a motor vehicle, or any other equipment which may be used outside the employment;
- (c) consumable supplies required in the course of that employment;
- (d) travel expenses in the course of employment except those incurred in traveling to and from the employee's residence and place of employment.

Subd. 5. **Expense reimbursement.** An employer, at the termination of an employee's employment, must reimburse the full amount deducted, directly or indirectly, for any of the items listed in subdivision 4. When reimbursement is made, the employer may require the employee to surrender any existing items for which the employer provided reimbursement."

10. The Department proved by a preponderance of the evidence that Budget towing violated Minn. Stat. § 177.24 by deducting amounts in excess of the \$50.00 limit from each of 29 employees and failing to reimburse those employees for the amounts deducted at the termination of their employment.

11. Minn. Stat. §§ 181.79 provides:

Subdivision 1. **Deduction requirements.** No employer shall make any deduction, directly or indirectly, from the wages due or earned by any employee, who is not an independent contractor, for lost or stolen property, damage to property, or to recover any other claimed indebtedness running from employee to employer, unless the employee, after the loss has occurred or the claimed indebtedness has arisen, voluntarily authorizes the employer in writing to make the deduction or unless the employee is held liable in a court of competent jurisdiction for the loss or indebtedness. Such authorization shall not be admissible as evidence in any civil or criminal proceeding. Any authorization for a deduction shall set forth the amount to be deducted from the employee's wages during each pay period. A deduction may not be in excess of the amount established by law as subject to garnishment or execution on wages.

Any agreement entered into between an employer and an employee contrary to this section shall be void. This section shall not apply to the following:

(a) in cases where a contrary provision in a collective bargaining agreement exists;

(b) any rules established by an employer for employees who are commissioned salespeople, where the rules are used for purposes of discipline, by fine or otherwise, in cases where errors or omissions in performing their duties exist; or

(c) in cases where an employee, prior to making a purchase or loan from the employer, voluntarily authorizes in writing that the cost of the purchase or loan shall be deducted from the employee's wages, at regular intervals or upon termination of employment.

Subd. 2. **Violations by employer.** An employer who violates the provisions of this section shall be liable in a civil action brought by the employee for twice the amount of the deduction or credit taken.

12. The Department has proved by a preponderance of the evidence that Budget Towing violated Minn. Stat. § 181.79. The DAMAGE CLAIM AGREEMENT signed by each of the employees Dasilva, Kennedy, Murker, Rasmussen, Stokvis and Sykes are void.

13. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions, and as Findings any Conclusions that are more appropriately described as Findings, including any factual findings included in the Prehearing Order on Motion for Summary Disposition.

14. These Conclusions are reached for the reasons set forth in the Memorandum below and the Memorandum in the Prehearing Order on Motion for Summary Disposition, which is hereby incorporated by reference into these Conclusions.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends that:

The Commissioner issue an order as follows:

1. Requiring Budget Towing to pay the amounts to the employees listed in Exhibit 3, for the unreimbursed, improper deductions and payments, in the total amount of \$31,302.38; and

2. Requiring Budget Towing to pay a civil penalty of \$1,000.00.

Dated: February 28, 2008

s/M. Kevin Snell

M. Kevin Snell
Administrative Law Judge

Reported: Digitally recorded.
No transcript prepared

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Labor and Industry will make the final decision after reviewing the hearing record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the office of M. Scott Brener, Commissioner, Minnesota Department of Labor and Industry, 443 Lafayette Road North, St. Paul, MN 55155, (651) 284-5065 to find out how to file objections or present argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.63, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The issues in this case are whether Budget Towing has violated Minnesota statutes and rules in its practices of deducting amounts from employees' wages for uniforms, equipment and damage to property, and relying on employees to make time records required to be kept by employers, and, if it has, what remedial action the Commissioner should take.

In response to the Department's request for summary disposition, the Administrative Law Judge previously determined that: Budget Towing violated the requirements of Minn. Stat. § 177.30 and Minn. R. 5200.0100 by failing to make and keep records for all hours worked each day and each work-week for all employees; and Budget Towing Violated the Requirements of Minn. Stat. § 177.24, subds. 4 and 5, by making improper unreimbursed deductions from employee wages for uniforms and telephone/pagers. The Order on Motion for Summary Disposition is hereby incorporated by reference. No further discussion on most of the issues discussed in that Order's Memorandum are necessary.

After the grant of partial summary disposition the following were the remaining issues that proceeded to hearing:

1. Calculation of unreimbursed deductions for the uniforms and Nextel telephones for the period from July 25, 2003, through July 25, 2005, (including all employees currently employed and the termination dates for all employees terminated during the period); and

3. Actual cost of uniform purchase and laundering for the period from July 25, 2003, through July 25, 2005; and

4. Actual cost of Nextel telephones for the period from July 25, 2003, through July 25, 2005; and

4. Whether there were violations of Minn. Stat. § 181.79 on deductions for damages to or loss of property.

Because Budget Towing called no witnesses and offered no exhibits at the hearing, the only testimony and exhibits were presented by the Department. The Department derived its calculations from a detailed review of the records provided by Budget Towing and surveys of a number of employees. The exhibits in the record offered by the Department, and accepted into the record were reliable. There was no evidence in the record regarding the actual cost for the rental and/or purchase of telephones/pagers or of rental and/or purchase or laundering of uniforms. Due to the fact that the undisputed evidence in the record showed that more than \$50.00 was deducted from the wages of each employee, and that none of those deductions were reimbursed, the Administrative Law Judge can come to no other conclusion than Minn. Stat. § 177.24, subds. 4 and 5 were violated.

Although the Minn. Stat. § 177.24 issue was addressed in the Order granting partial summary disposition, some further analysis is appropriate. Budget Towing rests its entire case on this issue on the argument and belief that Minn. Stat. § 177.24 is only a minimum wage statute and therefore, unless the deductions for uniforms and telephone/pagers brings an employee's pay below minimum wage, the language in subd. 4 stating: "Deductions, direct or indirect, for up to the full cost of the uniform or equipment as listed below, may not exceed \$50"²² doesn't apply. If Budget Towing's argument were to prevail, there would be no purpose in that language being present at all. The remainder of subd. 4, without that sentence, would be all that would be necessary to support Budget Towing's position.

Minn. Stat. § 645.16 provides in applicable part:

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions. When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

Nor is there any ambiguity in the sentence. An ambiguity is not created solely by the fact that counsel for the parties dispute the meaning of a statute. See, *Minneapolis-St. Paul Sanitary District*, 240 Minn. 434, 61 N.W.2d 533 (1953).

The fact that the headnote of section 177.24 states "Payment of Minimum Wages" is of no help to Budget Towing's argument. Headnotes to a statutory section have no value as aids to statutory construction for determination of legislative intent because the revisor of statutes inserts them as required by Minn. Stat. § 3C.06.²³ *In re Dissolution of School District No. 33*, 2390 Minn. 439, 60 N.W.2d 60 (1953). Each statutory provision must be given effect. Here there are basically two independent parts. One prevents deductions above an absolute amount. The other prevents deductions that would reduce a wage below minimum wage. They each serve a distinct purpose and lack nothing in clarity.

The only two factual issues addressed at the hearing were the circumstances surrounding the application of Minn. Stat. § 181.79 regarding the deductions for damage to property, and the calculation of the amounts improperly deducted from employee wages for uniforms and telephone/pagers. The records submitted by the Department and calculations therein regarding all three of those issues were correct and reliable.

²² Minn. Stat. § 177.24, subd. 4.

²³ Minn. Stat. 3C.08, Subd. 3. Provides: "The headnotes of the sections of any edition of the Minnesota Statutes printed in boldface type are mere catchwords to indicate the contents of the section and are not any part of the statute."

The evidence in the record suggests no other conclusion than Budget Towing deducted amounts from employee wages, without written authorizations to Budget Towing, signed by each employee after the loss or damage occurred, listing specific amounts. The initial so-called "Damage Claim" agreements, signed at the time of employment, lacking specific claims and amounts, were clearly void under the statute. All improper amounts deducted from employee wages must be reimbursed. The Commissioner has the authority and should so order the reimbursement.

M. K. S.